Supreme Court, U.S.
FILED

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No. OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

ROBERT M. AUS, and DAVID L. POPE,
Petitioners,

V.

ARMCO, INC., MR. A. C. WORRELL, Secretary Benefits Plan Administrative Committee, and ARMCO, INC. NONCONTRIBUTORY PENSION PLAN,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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9 pp

QUESTIONS PRESENTED

1. Where an ERISA[1] Plan fiduciary is given discretion in the Plan to interpret terms of the Plan, does the Fifth Circuit's test to determine abuse of discretion espoused in *Dennard v. Richards Group, Inc.*[2] and still used today conflict with the appropriate test used in other circuits and as mandated by this Court in *Firestone Tire & Rubber co. v. Bruch*[3].

2. Is the Fifth Circuit's inconsistent application of the *Dennard* test within the Circuit consistent with *Firestone* or indicative that the test is contrary to *Firestone*?

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[1]29 U.S.C. § 1001 et seq.

[2]681 F.2d 306 (5th Cir. 1982)

[3]489 U.S. 101 (1989)

3. Did *Firestone* overrule *Dennard* rendering the Fifth Circuit's continued use of the *Dennard* test erroneous?

4. Can the Fifth Circuit's use of the *Dennard* Test be tolerated since it promotes discrimination by not requiring in every instance consideration of a fiduciary's conflict of interest as mandated by *Firestone*?

5. Is the Fifth Circuit's standard of review under *Dennard* fatally flawed by allowing a legally incorrect (possibly illegal) interpretation by a fiduciary not to be an abuse of discretion?

LIST OF PARTIES AND RULE 29.1 LIST

The caption of this petition identifies all parties in the court of appeals. The same parties appeared in the district court. This petition is not filed by or on behalf of a corporation.

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OPINIONS BELOW

The unpublished opinion of the court of appeals is reprinted in the Appendix ("App.") at App. A. The opinion of the district court (unpublished) is reprinted at App. B. The order of the court of appeals

denying Pope and Aus' petition for rehearing is not reported and is reprinted at App. C.

JURISDICTION

The court of appeals entered Judgment on November 10, 1993. It denied a timely petition for rehearing on December 4, 1993. This Court has jurisdiction to review the judgment by writ of certiorari under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The statute involved is 29 U.S.C. § 1132(a)(1)(B) reprinted at App. D.

STATEMENT OF THE CASE

A. The Parties and Circumstances

This ERISA dispute revolves around a pension plan trustee's determination not to allow two terminated employees of Armco, Inc. ("Armco") to qualify for early retirement benefits pursuant to a Rule of 65

early retirement provision of the Armco Inc. Non-Contributory Pension Plan (the "Plan").

David L. Pope and Robert M. Aus ("Pope" and "Aus") were terminated by Armco in May of 1985 after each accumulating in excess of 65 total years combined service and age. Pope and Aus applied for Rule of 65 early retirement benefits pursuant to Rule 3.8 of the Plan[4]. Pope and Aus argued that their termination resulted from the "shutdown" of Armco Trading Services, the division of Armco for which they had worked. Historically, even though Section 3.8(d) of the Plan said nothing about shutdown, the Benefits Plan Administrative Committee ("BPAC") had awarded Rule of 65 early benefits to employees who had been terminated as a result of a shutdown. Pope

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[4]Section 3.8 is set forth in full at App. E.

and Aus properly followed the administrative review policies and procedures and each step of the way their requests were denied. Pope and Aus ultimately sued the Plan, Armco and A.C. Worrell (the secretary of BPAC) in the United States District Court for the Southern District of Texas, Houston Division.

B. Course of Proceedings and Disposition Below

Pope and Aus maintained at trial that BPAC abused its discretion and acted arbitrarily and capriciously in denying the requested benefits, in light of BPAC's prior determinations granting benefits in similar circumstances. Pope and Aus showed at trial that BPAC intended to restrict Rule of 65 benefits to shutdowns involving only major steel making or steel fabricating facilities or their divisions or departments, but instead sometimes granted benefits in

situations identical to the shutdown of Armco Trading Services. Throughout trial, Armco and the Plan maintained that BPAC had been consistent in its application of, and granting of, Rule of 65 benefits and that the circumstances of Pope and Aus' termination had not been a "shutdown" of Armco Trading Services.

The District Judge (Honorable John V. Singleton) found that the denial was arbitrary and capricious, amounted to an abuse of discretion, and awarded Pope and Aus their benefits. The Plan, Armco and Worrell argued on appeal to the Fifth Circuit, not that BPAC had consistently applied its own standards, but that the District Judge erred in using an incorrect and more restrictive definition of "shutdown" notwithstanding BPAC's own group study analysis and recommendation regarding

the restriction of shutdowns to major steel making and steel fabricating facilities.[5] The Plan and Armco further argued in the court of appeals that the District Judge used that definition for a "shutdown" and that the definition was too restrictive. The court of appeals agreed, giving deference to the new argument in that court that "Shutdown" could include a cessation of operations not including a major steel making facility or steel fabricating facility, if the division or department was in fact permanently closed. This allowed for BPAC's previous granting of Rule of 65 benefits in other situations prior to Armco Trading Services, but not as to Armco Trading Services.[6]

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[5]See Fifth Circuit opinion, App. 17A-20A.

[6]This was much to the surprise of Pope and Aus since Armco's own internal memoranda

The court of appeals reversed and rendered and a timely motion for rehearing was denied by the court of appeals.

REASONS FOR GRANTING THE WRIT

In this case, as well as in others since *Firestone*, the Fifth Circuit has continued sometimes to analyze abuse of discretion of plan fiduciaries which are given discretion to interpret provisions of a plan by the application of the *Dennard* test espoused by the Fifth Circuit in 1982. The *Dennard* test does not include an analysis of reasonable conduct by fiduciaries, instead it contains seven complex and convoluted parts, and it fails to consider conflict of interest in every

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dated April 12, 1985, directed to the Chief Executive Officer of Armco and referring to Armco Trading Services stated, "we can have this entire operation closed .... by June 30, 1985." (emphasis added) See App. 1F.

case. The Fifth Circuit set forth the *Dennard* test, citing its previous *Wildbur* case, in the case at bar as follows:

> Application of the abuse of discretion standard is a two-step process. First, a court must determine whether the administrator's interpretation of the plan is legally correct, considering (1) whether the administrator has uniformly construed the provision at issue in the past; (2) whether the administrator's interpretation of the provision is consistent with a fair reading of the plan; and (3) whether the interpretation results in an unanticipated cost. *Wildbur v. Arco Chemical Co.*, 974 F.2d 631, 637-38 (5th Cir. 1992). If a court finds that the administrator's decision was not legally correct, the second step requires that it determine whether the administrator abused his discretion. Courts examine four factors in connection with this analysis: (1) whether the administrator's interpretation is internally consistent with the remainder of the plan; (2) whether the administrator's interpretation comports with any relevant regulations formulated by the appropriate administrative agencies; (3) whether the factual background supports the

> administrator's determination and (4) whether there are inferences of an administrator's lack of good faith. *Wildbur*, 974 F. 2d at 638.

This test is in marked contrast to the test used by the other Circuits which have followed *Firestone*, and is in obvious conflict with *Firestone*.

The uncertainty of current American corporate life demands that this Court grant certiorari in this case in order to clarify and enforce the legislative mandates and intent of ERISA. Considering the current state of affairs with large corporate downsizing, lay-offs, restructuring, shutdowns and "outsourcing", thousands of employees who are participants in some form of an ERISA governed pension or retirement plan have been or will be affected in the near future by the impact of the decisions by the fiduciaries and trustees of those plans.

Writ of Certiorari should be granted so that the Supreme Court can direct the Fifth Circuit to apply the proper test and insure that the Fifth Circuit decisions are not contrary to the purpose of ERISA to "promote the interests of employees and their beneficiaries in employment benefit plans." *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85 (1983). In *Firestone* this Court established simple but straightforward guidelines for judicial review of decisions by those fiduciaries and trustees when they have denied an employee's request for benefits. A denial of benefits is to be reviewed under a "de novo" standard unless the benefit plan gives the fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the Plan. Where discretionary authority exists, principles of trust law apply and the fiduciary's

interpretation or decision will not be disturbed if reasonable. However, if such a fiduciary is operating under a conflict of interest, the conflict must be weighed as a factor in determining whether there is an abuse of discretion.

Since *Firestone*, when dealing with a plan which provides discretionary authority to the fiduciary, most circuits have consistently applied a "reasonableness" test in conjunction with the "abuse of discretion" or "arbitrary and capricious action" standard. They have done so appropriately in light of *Firestone*. Those circuits also consider conflict of interest as mandated by *Firestone*.

Nevertheless, in some cases such as the case at bar, the Fifth Circuit continues to refer to, and cite, pre-*Firestone* cases out of the Fifth Circuit in evaluating

fiduciaries' denials of benefit requests. However, not all Fifth Circuit opinions cite the earlier test; some refer to the "reasonableness" test like the other Circuits. The current test used by the Fifth Circuit in some cases (such as the case at bar) is contrary to the mandate of *Firestone* in that it both ignores the reasonableness test and fails to consider conflict of interest as a factor. The test also states that even an illegal interpretation by a fiduciary may not be arbitrary and capricious.

Your applicants strongly urge that the Fifth Circuit's test developed in *Dennard*, 681 F. 2d 306, (5th Cir. 1982), and still used today, was overruled by *Firestone* and leads to incorrect analysis of fiduciaries' decisions. This variance between the circuits in light of the clear mandates of

Firestone begs for review in light of the corporate climate in America and the thousands of persons to be affected by Fifth Circuit decisions in these types of cases.

SUMMARY OF ARGUMENT

Firestone makes it clear that the abuse of discretion test to determine if a fiduciary's decision to deny benefits was reasonable is applicable where discretion is given to the fiduciary in the plan to interpret terms of the plan.

The Fifth Circuit, in these instances, continues to apply the test that it developed in the *Dennard* case several years before *Firestone*. At least the Third, Fourth, Eighth, Tenth, Eleventh and District of Columbia Circuits have followed *Firestone* by applying the test for abuse of discretion by making a determination of whether the fiduciaries' actions in denying benefits

were reasonable. The test developed in *Dennard* and used by the Fifth Circuit is complex, internally conflicting and in stark contrast to the tests of the other circuits and the analysis by the court in *Firestone*. Additionally, the Fifth Circuit itself appears to be confused by applying the "reasonableness" test in some instances but the *Dennard* test in others.

The applicants argue in accordance with *DeNobel v. Vitro Corp.*, 885 F.2d 1180, 1188 (4th Cir. 1989) that the comprehensive test used by the Fifth Circuit in *Dennard* was effectively overruled by *Firestone*. Analysis of the development of the *Dennard* test and comparison to *Firestone* and other Circuits makes this clear.

Furthermore, the *Dennard* test is in itself contrary to *Firestone* in at least two specific and important matters. First,

Firestone requires that a conflict of interest must be weighed as a factor in determining whether there has been an abuse of discretion by a fiduciary when operating in a situation involving a conflict of interest. The *Dennard* test, as specifically cited in the case at bar by the Fifth Circuit requires only a consideration of whether there are "inferences of an administrator's lack of good faith" (App. 16A). Interesting also is the fact that this consideration is one of four factors which is considered, only after a determination is made that a fiduciary's decision was not legally correct. Obviously, conflict of interest is not a mandatory consideration by the Fifth Circuit since its consideration is subject to a prior finding regarding legal correctness.

In this fashion the *Dennard* test is contrary to *Firestone*.

Secondly, the Fifth Circuit *Dennard* test is conflicting with its own terms and can be applied in a fashion where a fiduciary's denial of benefits, while being legally incorrect (possibly "illegal"), is nevertheless not an abuse of discretion. That possibility, and the result created, should be of great concern to this Court.

I. THE FIFTH CIRCUIT *DENNARD* TEST, USED IN THE CASE AT BAR, IS NOT THE PROPER TEST OR STANDARD FOR DETERMINATION OF THE PROPRIETY OF FIDUCIARY'S DECISIONS TO DENY BENEFITS WHEN THE FIDUCIARY IS GIVEN DISCRETION IN THE PLAN TO INTERPRET PLAN PROVISIONS.

A. THE *DENNARD* TEST CONFLICTS WITH *FIRESTONE* AND THE TEST IN OTHER CIRCUITS

Where a trustee is given discretion to construe terms of a plan, *Firestone* specifically directs that principles of

trust law are applicable and that "the trustee's interpretation will not be disturbed if reasonable." 489 U.S. at 111. Petition for Writ of Certiorari was granted in *Firestone* specifically to resolve conflicts among the courts of appeals as to the appropriate standard of review in actions under 29 U.S.C. § 1132(a)(1)(B). 489 U.S. at 108.

Since *Firestone*, many of the Courts of Appeals have wrestled with fiduciaries' denials of benefits and have fairly uniformly applied the reasonableness test as espoused in *Firestone*. In *Block v. Pitney Bowes*, 952 F.2d 1450, 1454 (D.C. Cir. 1992), after numerous references to reasonableness, the Honorable Ruth Bader Ginsburg stated, "[t]he essential inquiry here, in short, is what the district court understood it to be: Did the committee reasonably construe and

apply the Pitney Bowes Plan in Ralph Block's case?" This District of Columbia Circuit case followed *Firestone*. In the Third Circuit, the Court stated that a determination to deny benefits must be upheld unless it was clear error or not rational. *Gillis v. Hoechst Celanese Corp.*, 4 F.3d 1137 (3rd Cir. 1993). The dictionary generally defines "rational" as manifesting or based upon reason. The Fourth Circuit, shortly after *Firestone*, while citing previous factors such as those used in *Dennard*, clearly concluded as follows:

> "The dispositive principle remains however, that where plan fiduciaries have offered a 'reasonable interpretation' of disputed provisions, 'courts may not replace [it] with an interpretation of their own' - and therefore cannot disturb as an abuse of discretion the challenged benefits termination." (emphasis added).

DeNobel v. Vitro Corp., 885 F.2d 1180, 1188 (4th Cir. 1989). In the Seventh Circuit,

the Court relies on a "reasoned explanation" for a particular outcome to dispell arbitrariness and capriciousness, *Pokratz v. Jones Dairy Farm*, 771 F. 2d 206, 209 (7th Cir. 1985). While this predates *Firestone*, it is yet another example of uniform use of a reasonableness test.

The Eighth Circuit has considered the applicability of *Firestone* in several recent opinions. In *Bolling v. Eli Lilly and Company*, 990 F. 2d 1028, 1030 (8th Cir. 1993) the court stated, "we cannot say the Committee's decision denying Bolling benefits "was unreasoned". And in *Sturges v. Hy-Vee Employee Benefit Plan and Trust*, 991 F. 2d 479, 480 (8th Cir. 1993) the court affirmed the finding of the district court and the plan's assertion that its interpretation of the plan was not unreasonable.

The Tenth Circuit has likewise employed a reasonableness standard. See *Woolsey v. Marion Laboratories*, 934 F. 2d 1452, 1457 (10th Cir. 1992). And the Eleventh Circuit has in some cases, much like *Gillis*, supra, determined if the interpretation was "made rationally," *Blank v. Bethlehem Steel Corp.*, 926 F. 2d 1090, 1093 (11th Cir. 1991) and in some cases has applied a "reasonable basis" test, specifically addressing conflict of interest as dictated by *Firestone*. See *Brown v. Blue Cross & Blue Shield of Alabama*, 898 F. 2d 1556, 1559 (11th Cir. 1990).

All of this notwithstanding, the Fifth Circuit sometimes steers clear of any inquiry which is based upon reasonableness or a rational basis. Instead, as solidified by the Fifth Circuit in *Wildbur v. Arco Chemical Co.*, 974 F. 2d 631,637 (5th Cir.)

reh'g denied, clarified, modified, 979 F. 2d 1013 (5th Cir. 1992), the *Dennard* test is used to examine BPAC's denial of benefits.

The only analysis by the Court based upon reasonableness in the case at bar was the court's finding that the definition given to "shutdown" by BPAC at the appellate level was reasonable notwithstanding that the term "shutdown" was not even included in the Plan provision in question. The determinative factor though, would have been, did BPAC act reasonably by determining that Armco Trading Services was not shutdown? This was never addressed by the Court,[7] and hence never scrutinized.

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[7]BPAC determined that Armco Trading Services had not been "shutdown" for purposes of Rule of 65 early retirement benefits. BPAC argued successfully on appeal that a "shutdown" was broader than what their own study committee report stated and that a "shutdown required a "closure" and that the facility "ceased to exist." Armco's own internal memorandum regarding

Instead, the Fifth Circuit continued the use of the convoluted two-part, seven sub-part test.

This action by the Fifth Circuit clearly conflicts with the mandates of *Firestone* and the application of the *Firestone* mandates by the other Circuits.

B. THE FIFTH CIRCUIT DOES NOT UNIFORMLY APPLY *FIRESTONE*

Although the *Dennard* test was employed in *Wildbur* and in the case at bar, there seems to be confusion in the Fifth Circuit about the appropriate test. District courts in the Fifth Circuit, and the Fifth Circuit Court of Appeals have continued in many other cases to apply the *Dennard* standards:

1. *Goodman v. S & A Restaurant Corp.*, 821 F. Supp. 1139 (S.D. Miss. 1993);

Armco Trading Services referred to the closing of Armco Trading Services as "entire operation closed."

2. *Jordan v. Cameron Iron Works*, 900 F. 2d 53 (5th Cir. 1990);

3. *Kennedy v. Electricians Pensions Plan, IBEW No. 995*, 954 F. 2d 1116 (5th Cir. 1992); and

4. *Jones v. Sonat, Inc. Master Employee Benefits Plan Admin. Comm.*, 997 F. 2d 113 (5th Cir. 1993)

However, district courts in the Fifth Circuit and the Fifth Circuit Court of Appeals have also ignored *Wildbur* and *Dennard* when applying the abuse of discretion review:

1. *Breaux v. Pipefitters Local Union*, 195, 807 F. Supp. 42 (E.D. Tex. 1992);

2. *Freeman v. Sickness and Accident Disability Plan of AT&T Technologies, Inc.*, 823 F. Supp. 404 (S.D. Miss. 1993);

3. *Salley v. E. I. DuPont de Nemours & Co.*, 966 F. 2d 1011 (5th Cir. 1992)

The *Breaux* Court concluded that there was no showing of an abuse of discretion, citing *Firestone*. There was no mention of

the *Dennard* test or application of the two-part, seven sub-part test. In *Freeman*, the District Court examined *Firestone* at length and concluded as follows:

> "This Court has reviewed the record and exhibits submitted and concludes that defendants' decision, based upon the evidence before it at the time, was reasonable." (at page 415).

The Court also considered the conflict of issue parameters at page 413. No mention was made of *Wildbur* or of *Dennard*, or their elaborate test, even though *Freeman* came out of the same District as *Goodman*.

Lastly, for purposes of this argument, the *Salley* case, involving the interpretation of plan provisions where the fiduciary had discretion to interpret provisions, held that there was an abuse of discretion. The Fifth Circuit so held in *Salley* in the complete absence of any discussion of *Dennard* or the test from

Dennard routinely and improperly followed in other Fifth Circuit opinions. Judge Williams cited *Firestone* and reviewed all the evidence, as did the appellate court, in order to make the determination. The Court specifically cited that any conflict of interest must be weighed as a factor in determining whether there is an abuse of discretion. This application and opinion in *Salley* conflicts directly with *Dennard*, *Wildbur* and the case at bar. The conflict among courts within the Fifth Circuit is evidence of refusal to follow *Firestone*.

C. ***DENNARD*** **WAS EFFECTIVELY OVERRULED BY** ***FIRESTONE*** **SUCH THAT THE FIFTH CIRCUIT'S DECISION IN THE CASE AT BAR, RELYING ON** ***DENNARD*** **IS CLEARLY WRONG.**

Firestone effectively overruled *Dennard*. This was recognized by Circuit Judge Phillips in *DeNobel* at page 1188 yet the Fifth circuit continues to apply *Dennard*:

The conclusion is far easier to reach by an examination of the test in light of the *Firestone* opinion. *Firestone* mandates a reasonableness test and dictates that "conflict of interest" must be considered. The *Dennard* test, as cited in *Wildbur* and in the case at bar is totally devoid of any references to reasonableness and does not speak to conflict of interest as a specific element. The *Dennard* test as still applied by the Fifth Circuit is inconsistent with *Firestone*.

II. IF A BENEFIT PLAN GIVES DISCRETION TO AN ADMINISTRATOR OR FIDUCIARY WHO IS OPERATING UNDER A CONFLICT OF INTEREST, THAT CONFLICT MUST BE WEIGHED AS A FACTOR IN DETERMINING WHETHER THERE IS AN ABUSE OF DISCRETION.

The only inference in the Fifth Circuit's *Dennard* and *Wildbur* test to conflict of interest appears in the fourth part of the second part of the test. As set out in the case at bar the court stated it as, "whether there are inferences of an administrator's lack of good faith." Unfortunately however, a lack of good faith does not equate to analysis of a conflict of interest or vice versa. Plain English demonstrates this. Most importantly though, under the Fifth Circuit test, the court need not in every case address "a lack of good faith" even if it equates to conflict of interest.

The second part of the two part test is not even reached if the Court analyzes the first three subparts of the first part of the test and finds that the fiduciary's decision was legally correct. Hence, the court under this flawed test can determine that there has been no abuse of discretion without ever considering anything even related to conflict of interest.

As Judge Jones stated in the case at bar, it is only when the Court finds that the administrator's decision was not legally correct that the second part of the test is invoked. Only in the second part, can conflict of interest ever be considered. This "quirk" in the test allows a fiduciary to make a decision based upon a legally correct interpretation while allowing the fiduciary to intentionally discriminate against applicants. At least in the cases

in the Fifth Circuit in which the reasonableness test is used the Court also considers conflict of interest. See *Freeman*, at page 410, see *Salley* at page 1014. This is contrary to *Firestone*.

III. THE *DENNARD* TEST AS USED IN *WILDBUR* AND AS USED IN THE CASE AT BAR IS FATALLY DEFECTIVE AS IT ALLOWS A LEGALLY INCORRECT INTERPRETATION BY A FIDUCIARY TO NOT BE AN ABUSE OF DISCRETION.

In its application of the *Dennard* test as emphasized in *Wildbur* and applied in the case at bar the Fifth Circuit states that even if a fiduciary's denial of benefits was legally incorrect, there can nevertheless be a finding that there has been no abuse of discretion! In applying the Fifth Circuit test, Judge Jones stated, "[e]ven if BPAC's denial was legally incorrect, however, the three factors under the second step of the *Wildbur* analysis would lead us to conclude

that BPAC did not abuse its discretion in this case." (App. 24A) It strikes the applicants as shocking that a fiduciary can make a legally incorrect (possibly "illegal") denial and it not be an abuse of discretion. The law, to be square with *Firestone*, is as was stated by Justice Ruth Bader Ginsburg and it must be found that a fiduciary "acted reasonably and legally" for there to not be an abuse of discretion.[8]

CONCLUSION

Firestone has clearly defined the test for determining whether a fiduciary has abused his discretion under circumstances where a fiduciary has discretion to interpret or construe terms of an ERISA Plan. The focus and test is whether the fiduciary has acted reasonably.

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[8] *Block* at page 1451.

Additionally, the Court must consider conflict of interest as a factor if a conflict of interest is present.

Most of the Circuits have followed *Firestone*. The Fifth Circuit has followed *Firestone* in several cases but has failed to follow *Firestone* in the line of cases still following *Dennard*. *Wildbur* is such a case, as is the case at bar. In these cases, the Fifth Circuit fails to apply a reasonableness standard and contrary to *Firestone* applies a conditional test that either ignores conflict of interest altogether or only weighs a conflict of interest if the first part of the test is failed. It does not weigh conflict of interest in all cases. The Fifth Circuit test is also totally flawed as it allows for a finding that there has been no abuse of

discretion even where the fiduciary has made a legally incorrect determination.

This Honorable Court must grant the Petition for Writ of Certiorari in order to mandate to the Fifth Circuit the appropriate reasonableness test incorporating considerations of conflict of interest. Since the Judgment in the Fifth Circuit was based on an inappropriate standard, ultimately its Judgment should be reversed and the Judgment of the District Court affirmed.

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 92-2515

ROBERT M. AUS and DAVID L. POPE,

Plaintiffs-Appellees,

versus

ARMCO, INC., ET AL.,

Defendants-Appellants.

Appeal from the United States
District Court for the Southern
District of Texas

(CA-H-87-2258)

Before JONES AND DeMOSS, Circuit Judges and KAZEN*, District Judge.**

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*District Judge of the Southern District of Texas, sitting by designation.

EDITH H. JONES, Circuit Judge:

Armco, Inc. and three other defendants[1] associated with Armco's pension plan appeal a district court order awarding plaintiffs Robert M. Aus and David L. Pope pension benefits which had been denied by Armco's pension plan administrator. The district court found that the Administrator's denial of benefits to Aus and Pope was an abuse of discretion. We reverse.

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*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

[1]The primary defendant-appellant is the Noncontributory Pension Plan of Armco, Inc. For the sake of clarity and convenience, we shall refer to the fiduciary and administrator of that Plan, the Benefits Plan Administrative Committee (BPAC), as the entity representing the interests of defendants-appellants.

BACKGROUND

Plaintiffs Aus and Pope are former employees of Armco, Inc., a domestic manufacturer of various steel products sold domestically and abroad. Aus and Pope began working for the company in the early 1960s. In 1980 Aus was named the general manager of Armco International Sales (AIS), the division responsible for marketing Armco's products internationally. Pope became Manager of Construction Products for AIS in 1981. Around this time, Aus oversaw a staff reduction from 100 employees to 60 employees concurrent with an office relocation from Ohio to Texas. These actions were consistent with downsizing occurring throughout the company in the early 1980s. In 1984, Armco transferred AIS from its Manufacturing and Services Division to Corporate Services, and renamed AIS as Armco

Trading Services (ATS). The name change and reorganization contemplated expanded activities, including the marketing of some non-Armco products overseas and a greater role in the coordination of international transactions from Armco's various operating divisions.

Armco's international business proved to be less profitable than hoped. In 1985 Armco's management decided to terminate 17 of AIS's 31 salaried (exempt) employees and transfer the remaining employees from their corporation staff positions to three Armco entities which were apparently operating as separate profit centers. Aus's and Pope's employment ended in May 1985.

BPAC characterizes these events as a "decentralization of ATS into the operating divisions," and insists that Armco continued to utilize the remaining 14 employees to

market their products internationally within the operating divisions. BPAC maintains that the international marketing functions formerly performed under ATS remain virtually unchanged within Armco.

Aus and Pope contend that Armco's actions resulted in ATS's being "shut down", with the retained people employed mainly to conclude some international projects. Aus testified that the ongoing business was not merged, and that his duty at the time of "to eliminate the activities, the business." Aus acknowledged, however, that eight of the 14 retained employees, having skills in trade finance and international shipping, were transferred to Armco's Specialty Steel division, and that that division continues to perform many of the functions formerly handled by ATS. Although the evidence at trial is conflicting, it appears that most,

if not all, of the 14 retained employees continued to perform activities related to international sales within the operating units, even physically remaining at their old ATS officers until a 5-year lease expired.

The characterization of the disposition of ATS is important because it dictates whether Aus and Pope are entitled to accelerated pension benefits under Armco's noncontributory pension plan ("Plan"), an "employee pension plan" subject to ERISA. 29 U.S.C. § 1000(2). The appellees claimed benefits under section 3.8(d) of the Plan, a provision known as the Rule of 65, which entitles vested nonexempt employees immediate access to full pension benefits

under certain specified circumstances.[2] The

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[2]That provision reads:

Section 3.8 Rule-of-65 Pension

> Any participant (1) who shall have had at least 20 years of Continuous Service ..., (2) who has not attained the age of 55 years, and (3) whose combined age and years of continued service shall equal 65 or more but less than 80, and
>
> > (a) whose Continuous Service is broken on or after August 23, 1984 by reason of a Layoff or physical disability, or
> >
> > (b) whose Continuous Service is not broken and who on or after August 23, 1984 is absent from work by reason of a Layoff resulting from his election to be placed on layoff status as a result of a permanent shutdown, or
> >
> > (c) whose Continuous Service is not broken and who is absent from work by reason of a physical disability or a Layoff other than a layoff resulting from an election referred to above and whose return to active employment is declared unlikely by the Administrative Committee, or
> >
> > (d) who considers that it would be in his interest to retire, and

fiduciary and administrator of the Plan, the Benefits Plan Administrative Committee (BPAC), acknowledged that the plaintiffs have satisfied all of the requirements of section 3.8(d) except the unwritten requirement that BPAC must first declare that the termination resulted from a "shutdown." The terms of section 3.8(d) of the Plan do not explicitly reference "shutdown."[3] Nevertheless, the parties

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> his Employing Company considers that such retirement would likewise be in its interest and the Administrative Committee approves an application for retirement under mutually satisfactory conditions,

and who has not been offered suitable long-term employment as defined by the Employing Company, shall be eligible to retire on or after August 23, 1984, and shall upon his retirement (hereinafter "rule-of-65 retirement") be eligible for a pension . .

[3]Section 3.8(b) refers to shutdown under conditions different from those at issue here.

agree that a shutdown determination is a prerequisite to obtaining an early pension under the Rule of 65.

Aus and Pope separately requested retirement benefits under the Rule of 65 shortly after their termination.[4] BPAC denied them benefits, maintaining that it had consistently interpreted the provision to require a "permanent shutdown" or "complete closure." BPAC reasoned that ATS was not shut down, but simply merged into other existing divisions, especially into its Specialty Steel Division.

Aus and Pope appealed the initial administrative denial of benefits, prompting BPAC to assemble an internal committee to study the shutdown issue and issue a report. The study committee recommended that BPAC

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[4]Aus and Pope are vested and would otherwise receive full pension benefits in the year 2001.

"continue to restrict use of the provision to situations involving significant reductions in force or in shutdowns of a major steel manufacturing of fabricating facility." BPAC subsequently denied Aus's and Pope's appeals. BPAC concluded that the Rule of 65 "has been used exclusively in shutdown situations. . . . The Rule has not been used in a job elimination or to implement a force reduction." (emphasis added). Evidence presented at trial confirmed that the rule of 65 had not been used in the case of normal job elimination or reductions in force. Evidence also showed that BPAC had declared shutdowns for purposes of § 3.8(d) in two or three situations involving departments or divisions that were not major steel manufacturing or fabricating facilities. Finally, in letters to Aus and Pope, BPAC

stated: "The Committee feels that the Rule of 65 is intended to protect salaried employees who lose employment because of the closing of a major steel making facility or steel fabrication facility or a significant department within such a facility."

After losing their appeal to BPAC, Aus and Pope brought the present lawsuit for wrongful denial of benefits under ERISA, 29 U.S.C. § 1132(a)(1)(B). The trial judge formulated a shutdown definition under the Plan's Rule of 65 and used that definition to conclude that BPAC had inconsistently granted Rule-of-65 benefits in the past. The judge decided that the Plan envisioned that § 3.8(d) be applied exclusively in situations where there has been a shutdown of a major steel making facility or steel fabricating facility or of a significant department within such a facility. Based on

this conclusion, he ruled that the denial of benefits was arbitrary and capricious because BPAC had "inconsistently" granted §3.8(d) benefits in cases of shutdowns where no major steelmaking or fabricating facility was involved. Consequently, the court ordered BPAC to pay full pension benefits to the plaintiffs retroactive to their termination.

On this appeal, the appellants forcefully dispute the judge's definition of "shutdown". They also contend that their defense was handicapped by the district judge's misplaced concern that the Plan possibly granted BPAC illegal "unfettered"

discretion.[5] In particular, the appellants argue that these concerns led the district judge to erroneously exclude the testimonies of two important defense witnesses who would have testified that international marketing operations continued after the alleged shutdown and that BPAC's decision-making process in the plaintiffs' case was proper, fair, and consistent with past BPAC determinations.

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[5]The district judge was especially concerned with the portion of the Plan which, after naming BPAC as the fiduciary with general responsibility and administrative powers, stated that "[BPAC] shall endeavor to make consistent determinations in cases involving the same circumstances, but shall not be required to do so. [BPAC may not] exercise its discretion in an arbitrary or capricious fashion . . . ." The judge, although troubled with the inconsistency possibly built into the grant of broad discretion, held that the grant was nevertheless valid under ERISA. The plaintiffs do not contest the Plan's validity.

DISCUSSION

Appellants brought their claim for wrongful denial of Plan benefits under ERISA. 29 U.S.C. § 1132(a)(1)(B). When an ERISA plan gives its administrator discretionary authority to determine eligibility for benefits or to construe its terms, a court reviews the administrator's denial of benefits under an abuse of discretion standard. *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 115, 109 S. Ct. 948, 956-57 (1989). On appeal, this Court, like the district court, applies the abuse-of-discretion standard to the administrator's decision. *Jones v. Sonat, Inc. Master Employee Benefits Plan Admin. Comm.*, 997 F.2d 113, 115 (5th Cir. 1993).

Application of the abuse of discretion standard is a two-step process. First, a court must determine whether the

administrator's interpretation of the plan is legally correct, considering (1) whether the administrator has uniformly construed the provision at issue in the past; (2) whether the administrator's interpretation of the provision is consistent with a fair reading of the plan; and (3) whether the interpretation results in an unanticipated cost. *Wildbur v. Arco Chemical Co.*, 974 F.2d 631, 637-38 (5th Cir. 1992). If a court finds that the administrator's decision was not legally correct, the second step requires that it determine whether the administrator abused his discretion. Courts examine four factors in connection with this analysis: (1) whether the administrator's interpretation is internally consistent with the remainder of the plan; (2) whether the administrator's interpretation comports with any relevant regulations formulated by the

appropriate administrative agencies; (3) whether the factual background supports the administrator's determination and (4) whether there are inferences of an administrator's lack of good faith. *Wildbur*, 974 F. 2d at 638.

A. "Legal Correctness"

The "legal correctness" of BPAC's decision is not resolved by the plain meaning of the Plan because requiring a "shutdown" as a criterion for § 3.8(d) benefits is not a written term but a concept applied by the administrator.

The first *Wildbur* factor in assessing "legal correctness," whether BPAC has uniformly construed the Rule of 65 in the past, is clearly the most important in this case. The district judge based his ruling primarily on his finding that BPAC's past interpretation of what constituted a

shutdown was not uniform. The appellants vigorously contest the shutdown definition that the judge used in his analysis: "a shutdown [involving] a major steel making facility, or steel fabrication facility or of some significant department of such a facility." Appellants argue that this definition misrepresents BPAC's understanding and usage of the term, and unfairly excludes from Rule-of-65 benefit consideration situations where Armco totally and permanently closed facilities or departments that did not make steel. The district judge emphasized, and BPAC readily admits, that it had in the past declared shutdowns under circumstances outside of this narrow definition. But whereas the district judge concluded that this proved BPAC's inconsistency, the appellants counter that these closures of Armco facilities (all

of which occurred in 1982) demonstrate that the district judge's definition is fundamentally flawed because it is too narrow. The appellants claim that BPAC analyzed scalebacks, plan idlings, closures, etc., for Rule-of-65 eligibility based on independent factors.[6] They insist that BPAC consistently limited Rule-of-65 benefits to participants who were terminated as a result of a facility or business being "totally and permanently closed in a physical sense." Under this criterion, they assert that ATS was different from past shutdown determinations involving non-steel facilities.

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[6]The appellants assert that BPAC inquired at one time or another into the following four factors in assessing whether a shutdown occurred: (1) whether there was a permanent cessation of operations; (2) whether a facility was vacated and physically closed; (3) whether the property and equipment was sold or salvaged; and (4) whether all employees were terminated.

Our review of the record persuades us that the court erred in adopting a narrow definition of "shutdown," a definition that pertained exclusively to steelmaking or steel fabricating facilities. We do not think BPAC's study committee report, which recommended that BPAC "continue to restrict use of the provision to situations involving significant reductions in force or in shutdowns of a major steel manufacturing or fabricating facility," or the similar sentence in BPAC's letters to Aus and Pope, merit the emphasis on the specific line of business apparently placed on them by the district judge. The parties all agree that BPAC occasionally accorded shutdown status to terminated non-steel facilities. It was incumbent on the trial court, in assessing the consistency of BPAC's practice, to defer to BPAC's reasonable interpretation of a

"shutdown". From past practice involving steelmaking and non-steelmaking facilities, it appears that BPAC focuses not just on the line of business in which the facility engaged, but on whether it actually shut down, i.e. ceased to exist. Viewed from this perspective, BPAC's actions reasonably defined a "shutdown." Further, the sentence in BPAC's letters to the appellees, which stated that BPAC "feels that the Rule of 65 is intended" for closures of major steelmaking of fabricating facilities, can reasonably be read as a guidepost for its determinations of closure rather than as a strict definition of the kinds of facilities involved.

We conclude that the first factor, whether BPAC uniformly construed the shutdown provision, weighs in the appellants' favor. Appellants presented

credible evidence that distinguishes the appellees' claims from earlier BPAC determinations that granted shutdown status to entities or departments in areas other than steel making. We emphasize that where there is no explicit guidance in the plan as to the meaning of a "shutdown;" where the parties agree that it is reasonable to require a "shutdown" as a condition of receiving early retirement benefits under § 3.8(d); and where BPAC's benefit determinations are consistent with its proffered definition of a "shutdown" -- the district court ought to have deferred to that definition.

The second factor, whether BPAC's interpretation is consistent with a fair reading of the Plan, argues in favor of BPAC. appellants presented persuasive evidence that the Rule of 65 was adopted to

give exempt employees the same retirement options as union employees in the prototypical shutdown of a large facility, e.g., a large steel plant in a one-factory town. BPAC detailed how the provision dovetails with other parts of the Plan, explained how the Plan's goals would be severely compromised by the district judge's ruling, which effectively stripped §3.8(d) of a meaningful shutdown requirement, and pointed out that the district judge's construction of the Plan would make the highly attractive and expensive benefits available under the provision a "first-resort" for many terminated employees. For these historical and pragmatic reasons, a fair reading of "shutdown" under the Plan would not encompass most internal corporate reorganizations or reductions in force.

The third factor in the "legal correctness" analysis is whether appellees' interpretation would burden the Plan with unanticipated costs. The Rule of 65 embodied in § 3.8(d) permits an extraordinary acceleration of benefits for which BPAC cannot actuarially plan. BPAC must pay such pensions immediately upon the occurrence of a shutdown, but given the uncertainty of current American corporate life, BPAC cannot anticipate the incidence of such benefits. Accordingly, if at all possible, retirement benefits must be determined under one of the other provisions in the Plan. Contrary to the appellees' assertions, there was substantial evidence that liberally granting Rule-of-65 benefits under the district court's relaxed definition of shutdown would significantly drain the assets of the Plan, jeopardizing

the security of retirees awaiting deferred pensions.

In light of the above analysis, we conclude that BPAC denied Rule of 65 benefits to the Plaintiffs under a "legally correct" interpretation of the Plan.

B. Abuse of Discretion

Even if BPAC's denial was legally incorrect, however, the three factors under the second step of the *Wildbur* analysis would lead us to conclude that BPAC did not abuse its discretion in this case. First, for many of the reasons noted above, BPAC's interpretation of the Plan is internally consistent, both historically and pragmatically. Second, the plaintiffs here presented no administrative regulations that would conflict with BPAC's interpretation. Third, BPAC devoted considerable time to the appellees' claims prior to this lawsuit,

even ordering that a review committee study the shutdown provision preparatory to deciding the appellees' internal appeal. BPAC's factual findings support its decision. Finally, Aus and Pope have presented little, if any, evidence of bad faith.

In light of our judgment, we need not address the exidentiary issues raised on appeal by BPAC.

For these reasons, the district court's judgment is REVERSED AND RENDERED.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

ROBERT M. AUS and DAVID L. POPE,	§	
Plaintiffs,	§	
VS.	§	CIVIL ACTION NO. H-87-2258
ARMCO, INC., ARMCO INC. NONCONTRIBUTORY PENSION PLAN, ET AL.,	§	
Defendants.	§	

MEMORANDUM OPINION

I.

Plaintiffs bring this action under the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §§ 1132, et. seq., for the recovery of certain benefits.

Both Plaintiffs are former employees of Defendant Armco's Armco Trading Services ("ATS"). Aus was general manager of ATS; Pope was manager of Project Sales Development, a department of ATS. Located in Houston, ATS served Armco's various

steelmaking, manufacturing and fabricating entities in marketing domestically produced Armco goods and services, and some non-Armco products, on the international market.

Aus' and Pope's employment with Armco ended on May 31, 1985, when ATS ceased to function, by virtue of a decision communicated to Aus by Armco Executive Vice President and Chief Operating Officer Robert Purdom in March of that year. The following month both Plaintiffs wrote to Defendant A. C. Worrell, Secretary of Armco's Benefit Plans Administrative Committee ("BPAC"), requesting the benefits that are the subject of this action.

Section 3.8 of the Armco Inc. Noncontributory Pension Plan ("the Plan") (Defendants' Exhibit 1) states, in part[1]:

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[1]Although Plaintiffs' Original Complaint referred to § 3.8 generally, Plaintiffs later narrowed the focus of their

Section 3.8 - Rule-of-65 Pension. Any Participant (1) who shall have had at least 20 years of Continuous Service as of his last day worked, (2) who has not attained the age of 55 years, and (3) whose combined age and years of Continuous Service shall equal 65 or more but less than 80, and

(a) Whose Continuous Service is broken on or after August 23, 1984 by reason of a Layoff or physical disability, or

(b) whose Continuous Service is not broken and who on or after August 23, 1984 is absent from work by reason of a layoff resulting from his election to be placed on layoff status as a result of a permanent shutdown, or

(c) whose Continuous Service is not broken and who is absent from work by reason of a physical disability or a layoff other than a layoff resulting from an election referred to above and whose return to active employment is declared unlikely by the Administrative Committee, or

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grievances to § 3.8(d). See Plaintiffs' Memorandum of Authority and Brief in Support of Plaintiffs' Response to Defendants' Motion to Dismiss and For Summary Judgment (file, #37), p. 10.

(d) who considers that it would be in his interest to retire, and his Employing Company considers that such retirement would likewise be in its interest and the Administrative Committee approves an application for retirement under mutually satisfactory conditions,

and who has not been offered suitable long-term employment as defined by the Employing Company, shall be eligible to retire on or after August 23, 1984, and shall upon his retirement (hereinafter "rule-of-65 retirement") be eligible for a pension; provided, however, that if at the time of application for retirement his Employing Company has not yet determined whether the Participant will be offered suitable long-term employment, the Participant will not be eligible to retire until the earlier of (i) the date on which the Employing Company advises the Participant that he will not be offered suitable long-term employment or (ii) the date on which the Participant incurs a break in Continuous Service.

BPAC discussed Plaintiffs' claims for Rule-of-65 benefits at meetings on June 20, September 17, October 11, and November 15, 1985 (minutes, Defendants' Exhibits 20, 21, 22, 23), and was briefed exhaustively on

their claims in a memorandum of October 7, 1985 from R. D. Brown, Assistant Secretary of the Plan (Defendants' Exhibit 24). Needless to say, Plaintiffs' claims were denied, in letters from Worrell dated December 4, 1985 (Exhibits 2a, 2b to #37 in file).

II.

Most of the contention in this case has centered around the question of whether the dissolution of ATS constituted a shutdown for purposes of § 3.8. Before the Court can consider that issue, however if a proper issue it is, a more fundamental question must be addressed.

The essential ruling on the question of what standard of review we must apply, is Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101 (1989) in which the Supreme Court held that

> [c]onsistent with established principles of trust law, we hold that a denial of benefits challenged under [ERISA] is to be reviewed under a de novo standard unless the benefit plan gives the administration or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan.

489 U.S. at 115.

It is apparent that de novo review would be inappropriate in the instant case. Section 2.1 of the Plan makes BPAC

> "the named fiduciary with the general responsibility and the power to administer and construe the provisions of the Plan, to determine questions of law and fact arising under the plan, to determine the amount of and authorize payment of benefits under the Plan ...".

Section 2.8 of the Plan states that whenever

> [BPAC] is vested with discretionary powers under the terms of this Plan, [BPAC] shall endeavor to make consistent determinations in cases involving the same circumstances, but shall not be required to do so. [BPAC may not] exercise its discretion in an arbitrary or capricious fashion ...

At trial the Court was troubled by the question of whether a pension plan that permits its administrators to act in an arbitrary manner can be consistent with ERISA - whether, to put the matter differently, this action amounts to an attack upon the Plan itself.

After further reflection, the Court is satisfied that the Plan provisions at issue here conform to the dictates of ERISA. Numerous decisions have held that ERISA does not prohibit a grant of such broad discretion to plan administrators as we find here. Fine v. Semet, 699 F.2d 1091, 1093 (11th Cir. 1983); Bayles v. Central States, Southeast and Southwest Areas Pension Fund, 602 F.2d 97 (5th Cir. 1979); Pompano v. Michael Schigrone & Sons, Inc., 680 F.2d 911, 914 (2d Cir. 1982), cert. denied, 459 U.S. 1039 (1982).

The case law also makes it clear, however, that even the broadest grant of discretion does not give the plan administrators carte blanche to do as they please. E.g., Fine v. Semet, supra:

> ... such broad grants of discretion do not give trustees unbounded or absolute authority in administering employee welfare plans. Their actions will not be sustained if they are proven to have been arbitrary and capricious.

699 F.2d at 1093 citing Bayles, supra, 602 F.2d at 100 (5th Cir. 1979).[2] We see that even if the "arbitrary and capricious" clause did not appear in 2.8, the ERISA case law would allow us to read such language into the Plan. We confess, however, that we do not know how to reconcile the "arbitrary and capricious" clause of 2.8 with that

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[2]The plan section at issue in Fine allowed the plan Advisory Committee to take certain actions "in its sole discretion" - surely as broad a grant of authority as can be imagined.

section's clause releasing BPAC from the obligation of making "consistent determinations in cases involving the same circumstances." Surely, according to any reasonable usage of the words, consistency and arbitrariness cannot coexist; and 2.8's insistence that BPAC shall "endeavor" to make consistent rulings seems virtually of no effect, followed as it is by the express denial of the obligation of consistency.

III.

Having concluded that § 2.8 of the Plan, though not a paradigm of good draughtmanship, does not on its face violate the dictates of ERISA, and also that we shall not review the defendants' actions de novo, we proceed to what we conceive to be the central issue of the case: did the defendants behave arbitrarily and capriciously in denying the plaintiffs early

retirement un-der the Rule of 65 provision of Plan § 3.8? Clearly this question is equivalent to another: did the defendants behave arbi-trarily and capriciously in ruling that the closing of ATS was not a "shutdown" for purposes of the allocation of benefits? We conclude that they did.

The Fifth Circuit has addressed itself several times to the methodology of ERISA plan interpretation. Viewed in the large, the process has two stages. First, the Court must determine the correct interpretation of the controverted provision. Second, the Court must determine whether the administrators of the plan acted arbitrarily or capriciously in light of the interpretation they gave the plan in the particular instance under discussion. Batchelor v. Int'l Brotherhood, 877 F2d 441, 444 (5th Cir. 1989); Lowry v. Bankers Life & Casualty

Retirement Plan, 865 F.2d 692, 694 (5th Cir. 1989, cert. denied, 493 U.S. 852 (1989), Denton v. First Nat'l Bank, 765 F.2d 1295, 1304 (5th Cir. 1985), Dennard v. Richards Group, Inc., 681 F.2d 306, 314 (5th Cir. 1982). A determination of the first step in favor of the Plaintiffs does not obviate the second step, because "the fact that a trustee's interpretation is not the correct one as determined by a District Court does not establish in itself arbitrary and capricious action, but is a factor in that determination." Lowry, supra, 865 F.2d at 694; Dennard, supra, 681 F.2d at 306.

(a) Correct Interpretation?

Following the Dennard analysis as expounded in Batchelor, supra, 877 F.2d at 444 et. seq., we consider three factors in determining the legally correct interpretation of the Plan.

(1) Uniformity of construction

The Defendants have maintained throughout this action, and in the relevant BPAC minutes, that § 3.8(d) has been applied exclusively in situations where there has been a shutdown of a major steel making facility, or steel fabrication facility, or of a significant department within such a facility, and that the dissolution of ATS did not constitute such an occurrence.

A reading of § 3.8(d) reveals no mention of any shutdown requirement at all. For the moment we ignore that interesting fact, and look to whether, in dispensing Rule-of-65 benefits under § 3.8(d), Defendants have in fact uniformly construed that provision to requiring a shutdown of a major steel making or fabricating facility or of some signifi-

cant department thereof.[3] The record makes it clear that they have not.

Defendants' Exhibit 24 is a report for BPAC on Aus' Rule-of-65 claim, prepared by Defendant Worrell among others, and dated October 7, 1985. The report "recommends" that benefits under § 3.8(d) be restricted to significant reductions in force and to Shutdowns. At trial Worrell testified that the discussion in the October 7 report was intended to establish narrow guidelines for future determinations. Also, he was reminded that in his deposition he had stated that in previous years BPAC had

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[3]To avoid having to repeat this unwieldy language throughout this opinion, we shall simply refer to "a shutdown of a major steel making facility, or steel fabrication facility, or of some significant department of such a facility", as a Shutdown, capitalized. Use of the uncapitalized word "shutdown" shall denote a broader, nontechnical understanding of the word, including, but by no means limited to, the circumstances that define a Shutdown.

sometimes allowed Rule-of-65 benefits in situations that did not amount to a Shutdown.[4]

It is obvious to the Court that BPAC's determinations on Rule-of-65 questions prior to the incidents from which this action stems, evinced no clear adherence to the Shutdown requirement. In 1982 Armco closed its Houston Pipe & Tube plant. As Worrell stated in his deposition (p. 83), BPAC determined the closure to be a shutdown, but the BPAC minutes (Defendants' Exhibit 8, p. 6) contain no discussion as to whether the facility was a major steel making facility - and, in Worrell's opinion it was not. He held the same opinion (deposition, p. 93) of the ARMCO plant in Denver, the closing of which in 1982 was also determined, without

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[4]Worrell's testimony appears in Volume II of the trial transcript, pp. 199-225.

discussion in the BPAC minutes, to be a shutdown for pension purposes. Defendants' Exhibit 10. BPAC also, in 1982 determined that the closure of the Resource Development Department of the Armco Material Resources Division was a shutdown for pension purposes; again, the BPAC minutes (Defendants' Exhibit 11) are devoid of discussion, and Worrell was firmly of the opinion that "it was not a steel making or steel fabricating facility" (deposition, p. 95-96)

There is no need to multiply examples further; it is patently clear that BPAC's determinations on the subject of shutdowns and Rule-of-65 benefits have been anything but uniform.

(2) Fair reading

Dennard and Batchelor bid us next consider whether BPAC's interpretation of

the plan is a fair one. Inasmuch as § 3.8(d) makes no mention of any kind of shutdown requirement, we would be hard-pressed to find BPAC's interpretation to be "fair". We observe that another Rule-of-65 provision, § 3.8(b), does mention something called a "permanent shutdown", but does not expand upon the precise meaning of the phrase. If those who drafted § 3.8(d) had wished to confine its operation to what we have called a Shutdown, they could easily have said so.

(3) Unanticipated costs

An interpretation of a disputed Plan provision is "less likely to be legally correct" if it would give rise to "substantial unanticipated costs to the Plan." Batchelor, 877 F.2d at 445; Lowry, supra, 865 F.2d at 695. To resolve this issue would require us to consider not only

the costs incurred to the Plan on account of Aus and Pope, but also future costs resulting from similar claims. See Batchelor, 877 F.2d at 445. Since the record does not furnish us with the means to make such a determination, we shall not attempt to do so.

We conclude the first step of our interpretive process by holding that BPAC has incorrectly interpreted § 3.8(d) of the Plan to require, and to have always required, a Shutdown to trigger the operation of Rule-of-65 benefits.

(b) Arbitrary or Capricious?

As noted supra, a finding that a trustee's interpretation of a plan is incorrect is a factor supporting, but not mandating, a finding of arbitrary and capricious action. The cases we have cited direct us further to

> view as probative of the good faith of a trustee or administrator the following factors: (1) internal consistency of a plan under the interpretation given by the administrators or trustees; (2) any relevant regulations formulated by the appropriate administrative agencies ... and (3) factual back-ground of the determination by a plan and inferences of lack of good faith.

Dennard, 681 F.2d at 314.

We need not consider the second factor, since plaintiffs have not attempted to raise it. See Plaintiffs' Memorandum (file, #37), p. 27. As to the first factor, while we cannot say that BPAC's interpretation of § 3.8(d) actually clashes with another provision of the Plan, we are struck by the fact, already noted, that § 3.8(d) contains no mention of any shutdown requirement, howsoever defined. It is evident that in requiring a Shutdown for issuance of Rule-of-65 benefits, BPAC is not only imposing a requirement that has no basis in the Plan

itself; it is also, to reiterate, imposing a requirement that has by no means been applied uniformly in the past, Defendants' pretensions to the contrary notwithstanding. The combination of these two circumstances - the imposition of a requirement without basis in the Plan, and the application (and non-application) of that requirement in a manifestly non-uniform manner - necessitate a conclusion that in denying Plaintiffs' Rule-of-65 benefits, Defendants acted arbitrarily and capriciously.[5]

Judgment for plaintiffs.

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[5]Having so concluded, we need not go into the third factor in the passage from Dennard quoted supra.

Damages and attorneys' fees are set forth in the Final Judgment signed on this date.

Signed at Houston, Texas, this 29th day of May, 1992.

John V. Singleton
Senior United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

ROBERT M. AUS and DAVID L. POPE,	§	
Plaintiffs,	§	
VS.	§	CIVIL ACTION NO. H-87-2258
ARMCO, INC., ARMCO INC. NONCONTRIBUTORY PENSION PLAN, ET AL.,	§	
Defendants.	§	

FINAL JUDGMENT

For the reasons given in the Memorandum Opinion signed on this date, it is ORDERED, ADJUDGED and DECREED that:

Plaintiff Pope is entitled to recover of all defendants, jointly and severally, the sum of $1,453.67 for each month from July, 1985 through the date of this Judgment, plus prejudgment interest on each payment at the rate of 10% from its due date through the date of this Judgment, plus postjudgment interest at the rate of 4.26%;

Plaintiff Pope is further entitled to recover of all defendants, jointly and severally, the sum of $300.00 per month in compensation for his medical insurance expenses from July, 1985 through the date of this Judgment, plus prejudgment interest on each payment at the rate of 10% from its due date through the date of this Judgment, plus postjudgment interest at the rate of 4.26% ;

Plaintiff Aus is entitled to recover of all defendants, jointly and severally, the sum of $2,272.03 for each month from July, 1985 through the date of this Judgment, plus prejudgment interest on each payment at the rate of 10% from its due date through the date of this Judgment, plus postjudgment interest at the rate of 4.26% ;

Plaintiffs Pope and Aus are further to recover attorneys' fees of $21,538.18 and

costs of court. 29 U.S.C. § 1132 (g)(1).

Signed at Houston, Texas, this 29th day of May, 1992.

_____

John V. Singleton
Senior United States District Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 92-2515

ROBERT M. AUS, and DAVID L. POPE,

Plaintiffs-Appellees,

versus

ARMCO, INC., ET AL.,

Defendants-Appellants.

Appeal from the United States District Court for the Southern District of Texas

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ON PETITION FOR REHEARING

(December 9, 1993)

Before JONES and DeMOSS, Circuit Judges and KAZEN*, District Judge.

PER CURIAM:

---

*District Judge of the Southern District of Texas, sitting by designation.

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby Denied**.

ENTERED FOR THE COURT: 12/4/93**

/S/
United States Circuit Judge

**Handwritten by Judge Jones.

29 U.S.C. § 1132(a)(1)(B). Civil enforcement

(a) Persons empowered to bring a civil action

A civil action may be brought -

(1) by a participant or beneficiary -

(A) . . .

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

Section 3.8 - Rule-of-65 Pension. Any Participant (1) who shall have had at least 20 years of Continuous Service as of his last day worked, (2) who has not attained the age of 55 years, and (3) whose combined age and years of Continuous Service shall equal 65 or more but less than 80, and

(a) Whose Continuous Service is broken on or after August 23, 1984 by reason of a Layoff or physical disability, or

(b) whose Continuous Service is not broken and who on or after August 23, 1984 is absent from work by reason of a layoff resulting from his election to be placed on layoff status as a result of a permanent shutdown, or

(c) whose Continuous Service is not broken and who is absent from work by reason of a physical disability or a layoff other than a layoff resulting from an election referred to above and whose return to active employment is declared unlikely by the Administrative Committee, or

(d) who considers that it would be in his interest to retire, and his Employing Company considers that such retirement would likewise be in its interest and the Administrative Committee approves an application for

retirement under mutually satisfactory conditions,

and who has not been offered suitable long-term employment as defined by the Employing Company, shall be eligible to retire on or after August 23, 1984, and shall upon his retirement (hereinafter "rule-of-65 retirement") be eligible for a pension; provided, however, that if at the time of application for retirement his Employing Company has not yet determined whether the Participant will be offered suitable long-term employment, the Participant will not be eligible to retire until the earlier of (i) the date on which the Employing Company advises the Participant that he will not be offered suitable long-term employment or (ii) the date on which the Participant incurs a break in Continuous Service.

bim:c:\pope-aus.ape

Optimistically, I believe there is a chance we can have this entire operation closed and all employees placed or separated by June 30, 1985.

(2)

No. 93-1421

Supreme Court, U.S.
FILED
APR 15 1994
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1993

ROBERT M. AUS, and DAVID L. POPE,

Petitioners,

v.

ARMCO, INC., MR. A. C. WORRELL, Secretary Benefits Plan Administrative Committee, and ARMCO, INC. NONCONTRIBUTORY PENSION PLAN,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF RESPONDENTS ARMCO, INC., MR. A. C. WORRELL, Secretary Benefits Plan Administrative Committee, and ARMCO, INC. NONCONTRIBUTORY PENSION PLAN IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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No. 93-1421

In The

Supreme Court of the United States

October Term, 1993

ROBERT M. AUS, and DAVID L. POPE,

Petitioners,

v.

ARMCO, INC., MR. A. C. WORRELL, Secretary Benefits Plan Administrative Committee, and ARMCO, INC. NONCONTRIBUTORY PENSION PLAN,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF RESPONDENTS ARMCO, INC., MR. A. C. WORRELL, Secretary Benefits Plan Administrative Committee, and ARMCO, INC. NONCONTRIBUTORY PENSION PLAN IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Respondents, Armco, Inc., Mr. A. C. Worrell, Secretary Benefits Plan Administrative Committee, and Armco, Inc. Noncontributory Pension Plan (collectively "Armco"), respectfully request that the Petition for Writ

of Certiorari to the United States Court of Appeals for the Fifth Circuit be denied.

STATEMENT OF THE CASE

Petitioners Aus and Pope are former employees of Armco and participants in the Armco Inc. Noncontributory Pension Plan (the "Plan") with vested retirement benefits. After they were terminated by Armco in a reduction in force, each applied to the Plan for a special retirement benefit under the Plan's Rule of 65 benefit provision, which permits participants to receive immediate retirement benefits before they reach normal retirement age, 65, or early retirement age, 55, under certain circumstances. Their application for a Rule of 65 benefit was denied by the Plan's named fiduciary the Benefit Plan Administrative Committee ("BPAC"). Aus and Pope then commenced this action against the Plan, A. C. Worrell, BPAC's Secretary and Armco, the Plan's sponsor. The relevant facts in this case, set forth fully in the opinion of the Fifth Circuit, in Petition Appendix at 3A-13A,[1] are summarized briefly.

Beginning in the early 1980's, Armco made a strategic decision to downsize and decentralize its corporate staff functions. By 1985, recognizing that its international business was not as profitable as it had hoped, Armco decided to decentralize the corporate international marketing function, Armco Trading Services ("ATS"), and

[1] References to the Petition Appendix are hereinafter referred to as "P. App."

place that function with the operating divisions such as Specialty Steel division, Encorp, and the Construction Products division. Armco directed Aus, the ATS general manager, and his managers, including Pope, to manage this decentralization of function and oversee an orderly reduction in force.

By late May 1985, the restructuring had resulted in the transfer of ATS employees to the Specialty Steel and other divisions, where they continued to perform the same core functions they performed at ATS. The employees transferred continued to work in the same locations without interruption. The employees not transferred, including Aus and Pope, were terminated in a reduction of force.

At the time of their termination, Aus and Pope, age 46, were fully vested in the Plan. As fully vested Plan participants, Aus and Pope are entitled to receive full pension benefits beginning at age 65 or actuarially reduced benefits beginning at age 55.

In addition to normal and early retirement benefits, the Plan also provides pension benefits to qualifying individuals under certain specified circumstances – the Rule of 65 benefit, set forth in Plan § 3.8, is one such provision. Directly after their termination, Aus and Pope applied for an immediate, unreduced pension benefit under this provision.

The Rule of 65 benefit was added to the Plan to provide benefits for unrepresented salaried employees in parity with hourly employees receiving benefits pursuant to collectively bargained plans as the result of a shutdown by the company. Consistent with the origin of Rule

of 65, BPAC has uniformly construed Plan § 3.8(d) as requiring a determination that the termination of employment resulted from a shutdown.

Because the decentralization of ATS into Armco's operating divisions and the concurrent reduction in force did not constitute a shutdown, as that term had been interpreted by BPAC, BPAC determined that neither Aus nor Pope qualified for Rule of 65 benefits. Aus and Pope appealed this determination.

BPAC deferred consideration of their appeals pending a study analyzing the claims in light of the express provisions of the Plan. After considering the report of the study committee, BPAC affirmed its original denial of benefits, finding that the ATS function had been assimilated into other divisions and, therefore, was more like a force reduction than a permanent closing.

Aus and Pope next challenged BPAC's determination in this lawsuit. At trial, Armco produced evidence that it had applied its requirement of a shutdown determination consistently under the Rule of 65 provision.[2] However, the district court grafted an additional requirement onto BPAC's shutdown definition: it defined the "Shutdown" as being restricted to shutdowns involving only major steel making or steel fabricating facilities, or of a significant department within such a facility. Based on its own

---

[2] Petitioners Aus and Pope incorrectly state that BPAC "sometimes granted benefits in situations identical to the shutdown of Armco Tracing Services." Petition at 4-5. This statement is refuted by the record, which conclusively demonstrates that BPAC consistently applied its shutdown criterion in making determinations under Plan § 3.8(d).

definition, the district court concluded that BPAC had not applied § 3.8(d) consistently and ruled in favor of Aus and Pope. On appeal, the Fifth Circuit reversed the judgment of the district court and rendered, concluding that BPAC's focus on whether a facility was shut down "reasonably defined a 'shutdown.' " P. App. at 20A. In concluding that BPAC did not abuse its discretion, the court further observed that BPAC's interpretation of the Plan was internally consistent, its factual findings supported its decision, and that Aus and Pope had presented little, if any, evidence of bad faith. P. App. at 24A-25A.

SUMMARY OF THE ARGUMENT

Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101 (1989), overruled only the wholesale application of arbitrary and capricious review in reviewing ERISA plan determinations; it did not require the abandonment of well-established factors used to guide judicial analysis when an abuse of discretion review is appropriate. The Fifth Circuit's two-step abuse of discretion review constitutes an inquiry into the reasonableness of a plan administrator's plan interpretation consistent with the requirements of *Firestone*. In addition, the Fifth Circuit's inquiry incorporates consideration of whether a conflict of interest exists, both by examining the specific language of the plan and the factual background of the determination.

In this case, the Fifth Circuit's analysis, informed by its two-step analysis as restated in *Wildbur v. ARCO Chem.*

Co.,[3] addressed the propriety of the Plan administrator's determination and observed the absence of any significant evidence of a lack of good faith. Accordingly, the Fifth Circuit correctly addressed the issues of reasonableness and conflict of interest as directed in *Firestone* in deciding this case.

REASONS FOR DENYING THE WRIT

A. The Fifth Circuit's abuse of discretion review complies with the dictates of this Court.

In *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989), this Court disapproved the wholesale importation of the arbitrary and capricious standard to review the benefit eligibility determinations of employee benefits plan administrators under the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1001 *et seq.* *Id.* at 109. *Firestone* held that courts should review under a *de novo* standard unless the plan expressly gives the plan administrator discretionary authority to make eligibility determinations or interpret plan terms. *Id.* at 115. When the plan confers discretionary authority on plan administrators, their decisions are subject to an abuse of discretion review. *See id.* This Court explained that while conflict of interest is a factor to consider, the appropriate application of each standard of review relies on the terms of the plan, not on whether the plan administrator operated under a conflict of interest. *Id.*

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[3] 974 F.2d 631, 637, *clarified*, 979 F.2d 1013 (5th Cir. 1992).

Since *Firestone*, the Fifth Circuit has considered the continued vitality of the two-step approach first enunciated in *Dennard v. Richards Group, Inc.*, 681 F.2d 306 (5th Cir. 1982), to guide its analysis under the abuse of discretion standard applicable to review a plan interpretation of an ERISA plan administrator when the plan expressly confers the administrator discretionary authority to interpret its terms. *See Wildbur v. ARCO Chem. Co.*, 974 F.2d 631, 637, *clarified*, 979 F.2d 1013 (5th Cir. 1992); *Batchelor v. International Bhd. of Elec. Workers Local 861*, 877 F.2d 441, 444-45 (5th Cir. 1989). The Fifth Circuit and other circuits have recognized that *Firestone* does not require the reviewing court to abandon its conceptual framework for an abuse of discretion analysis when that standard of review is appropriate. *See, e.g., Brown v. Blue Cross & Blue Shield of Alabama*, 898 F.2d 1556, 1560 n.4, 1570 (11th Cir. 1990) (citing cases and applying Fifth Circuit's two-step inquiry); *De Nobel v. Vitro Corp.*, 885 F.2d 1180, 1185 (4th Cir. 1989) (recognizing that while this Court prescribed rules for review of ERISA benefit denials which supplanted the lower court approaches, it did not reject all the concepts of review embodied in those approaches);[4] *Batchelor*, 877 F.2d 441, 444-45 & n.10 (5th Cir. 1989) (using *Dennard* as guidance while recognizing that *Firestone* requires an abuse of discretion review).

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[4] The suggestion in the Petition that *De Nobel* recognized that *Firestone* overruled *Dennard* mischaracterizes the Fourth Circuit's opinion, which suggests that the factors cited in *Dennard* remain appropriate tools for analysis after *Firestone*. *See* 885 F.2d at 1185, 1188.

Aus and Pope's arguments rest on semantic, rather than substantive, distinctions. *Firestone* does not attach any talismanic significance to the words "reasonable" and "conflict of interest," just as it does not designate any other "magic word[s]." *Cf. Block v. Pitney Bowes, Inc.*, 952 F.2d 1450, 1453 (D.C. Cir. 1992) (Ginsburg, J.) (plan need not contain word "discretion" to trigger application of abuse of discretion review).

The analytical framework employed by the Fifth Circuit encompasses inquiries into both reasonableness and conflict of interest. First, the *Dennard* factors provide an appropriate framework for inquiry into the reasonableness of plan term construction as required by *Firestone*. *See De Nobel*, 885 F.2d at 1188 (citing *Dennard* among other pre-*Firestone* cases as providing guidance for a reasonableness inquiry entailed in an abuse of discretion review); *Dennard*, 681 F.2d at 314 (first step of analysis requires inquiry into " 'fair reading' *and reasonableness of that reading*") (emphasis added).

Second, the Fifth Circuit has recognized that it must weigh as a factor any evidence of a conflict of interest when reviewing for an abuse of discretion. *See, e.g., Haubold v. Intermedics, Inc.*, 11 F.3d 1333, 1337 (5th Cir. 1994); *Jones v. Sonat, Inc. Master Employee Benefits Plan Admin. Comm.*, 997 F.2d 113, 116 (5th Cir. 1993) (quoting *Brown*, 898 F.2d at 1566-67); *Wildbur*, 974 F.2d at 638 (explaining that "inquiry into factual background of a determination and any inferences of lack of good faith," as required by *Dennard*, entails consideration of any conflict of interest); *Lowry v. Bankers Life & Casualty Retirement Plan*, 871 F.2d 522, 525 & n.6 (5th Cir.) (evidence of partiality affects stringency of review), *cert. denied*, 493 U.S. 852 (1989); *see*

also Dennard, 681 F.2d at 316 ("Consistency of the administrator's or trustee's interpretation of a provision with the remainder of a plan is one indication of good-faith."). These cases clarify that the Fifth Circuit's abuse of discretion review encompasses consideration of whether a conflict of interest exists.[5]

Accordingly, the Fifth Circuit properly views the *Dennard* factors as appropriate tools for review. *See Wildbur*, 974 F.2d at 637.

B. The Fifth Circuit's abuse of discretion review comports with those of other courts of appeals.

Because the two-step *Dennard* analysis amounts to an inquiry into the reasonableness of an ERISA plan administrator's decision as mandated by *Firestone*, it comports

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[5] No case suggests that the Fifth Circuit has not considered a conflict of interest when the facts have raised the issue. *See, e.g., Haubold*, 11 F.3d at 1341 ("In light of this evidence, our own reading of the plans, and after careful consideration of the actual conflicts of interest under which the plan administrator was acting, we are persuaded that the plan administrator gave the plans their legally correct interpretation."); *see also Wildbur*, 974 F.2d at 638 (" 'a wrong but apparently reasonable interpretation is arbitrary and capricious if it advances the conflicting interest of the fiduciary at the expense of the affected beneficiary or beneficiaries unless the fiduciary justifies the interpretation on the ground of its benefit to the class of all participants and beneficiaries' ") (*quoting Brown*, 898 F.2d at 1566-67)). This treatment belies Petitioner's concern that the Fifth Circuit would let evidence of a conflict of interest go unaddressed. Further, *Dennard* itself demonstrates that the court addresses the conflict of interest issue in the first step of its analysis. *See* 681 F.2d at 316.

with the approaches used in other circuits properly following *Firestone*. Accordingly, rather than conflicting with *De Nobel v. Vitro Corp.*, 885 F.2d 1180, 1185 (4th Cir. 1989), *Block v. Pitney Bowes*, 952 F.2d 1450 (D.C. Cir. 1992), or *Brown v. Blue Cross & Blue Shield of Alabama*, 898 F.2d 1556 (11th Cir. 1990), as suggested by Aus and Pope, the Fifth Circuit's inquiry harmonizes with the approaches used in these other circuits.

In fact, the Fourth and Eleventh Circuits explicitly note their congruence with the thrust of the Fifth Circuit's approach. *See De Nobel*, 885 F.2d at 1188 (expressly recognizing *Dennard* as involving an inquiry into the reasonableness of a plan administrator's decisions); *Brown*, 898 F.2d at 1566-67 & n.12, 1570. Moreover, the Fifth and District of Columbia Circuits both exhibit the same general philosophy toward the shift from arbitrary and capricious to abuse of discretion review in this context. *Compare Wildbur*, 974 F.2d at 635 n.7 (detecting only a semantic, not a substantive, difference in labels) *with Block*, 952 F.2d at 1454 (Ginsburg, J.) (distinction, if any, is subtle; no need to adopt one phrase and avoid the other).

Firestone did not address the question whether the abuse of discretion standard applies to review the factual determinations of ERISA plan administrators. *See Pierre v. Connecticut Gen. Life Ins. Co.*, 932 F.2d 1552, 1561-62 (5th Cir.), *cert. denied*, 112 S. Ct. 453 (1991). The court of appeals decision cited by Aus and Pope as evidence of inconsistency involved a review of a factual determination leading to the termination of benefits, not a challenge to a plan interpretation. *See Salley v. E.I. DuPont de Nemours & Co.*, 966 F.2d 1011, 1015 (5th Cir. 1992); *see also Duhon v. Texaco, Inc.*, 15 F.3d 1302, 1309 (5th Cir. 1994)

(evidence supported administrator's finding; plaintiff failed to present evidence to refute medical opinion that he was capable of sedentary to light work); *Penn v. Howe-Baker Eng'rs, Inc.*, 898 F.2d 1096, 1100-01 (5th Cir. 1990) (sufficient evidence supported plan administrator's finding that employee was not laid off). Because the *Dennard* factors apply only to review plan interpretations,[6] there is no reason for them to have appeared in *Salley*. When the issue before the court has involved plan interpretation, as in this case, the Fifth Circuit Court of Appeals has applied the *Dennard* analysis as a tool to aid in its abuse of discretion review.[7]

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[6] *See generally Wildbur*, 974 F.2d at 641-42 (distinguishing between factual determinations and plan interpretation).

[7] While the Fifth Circuit recently has declared that it is not bound to apply the *Dennard* inquiry in every case, see *Duhon v. Texaco, Inc.*, 15 F.3d 1302, 1307 n.3 (5th Cir. 1994), it nonetheless has done so in this case and all prior cases when confronted with the challenge that a plan administrator abused its discretion in interpreting plan terms. *See, e.g., Jones*, 997 F.2d at 115-16; *Wildbur*, 974 F.2d at 637-38. In *Duhon*, the disagreement among the panel appears to stem from how they construe the issue on appeal: the majority focuses on the factual determination in light of the clear language of the plan, but the dissent confronts the administrator's plan language interpretation. *Compare* 15 F.3d at 1307 & n.3 (majority) *with id.* at 1309, 1310-11 (dissent). The majority conducted an abuse of discretion review relying on the reasoning of then-Judge Ruth Bader Ginsburg in *Block*, 952 F.2d at 1450. *See Duhon*, 15 F.3d at 1308-09.

C. The Fifth Circuit correctly applied the standard of review mandated in *Firestone* to this case.

Because Aus and Pope challenged BPAC's interpretation of the Rule of 65 provision, the court applied the *Dennard* inquiry, as restated in *Wildbur*, to review BPAC's decision in this case. The court of appeals, proceeding from the parties' agreement that the "shutdown" requirement was reasonable, concluded that BPAC uniformly construed its shutdown provision. The court next determined that historical and pragmatic reasons made BPAC's construction of the shutdown requirement consistent with a fair reading of the Plan. In applying the final inquiry under the first step of its analysis, the court observed that a more liberal construction of the shutdown criterion than that actually used by BPAC would have resulted in significant unanticipated costs. In light of these considerations, the court concluded that Aus and Pope were denied benefits under a "legally correct" interpretation of the Plan. P. App. 20A-24A.

In declaring that BPAC had not abused its discretion in denying Rule of 65 benefits to Aus and Pope, the court added that BPAC's plan interpretation was internally consistent, its decision was made after a thorough analysis, and little, if any, evidence of bad faith appeared in the record. P. App. 24A-25A. The court's careful consideration of these various factors, as guided by *Wildbur*'s articulation of the *Dennard* analysis, exhibits an inquiry into whether BPAC's interpretation was reasonable and whether a conflict of interest existed. Accordingly, the Fifth Circuit's abuse of discretion analysis in this case complies with the requirements of *Firestone*.

Finally, Aus and Pope express fear that the application of *Dennard* test may yield the conclusion that a plan interpretation, while legally incorrect, does not amount to an abuse of discretion. *Firestone* does not mandate the conclusion that a legally incorrect plan interpretation, without more, constitutes an abuse of discretion. This case does not present the issue, nor do Aus and Pope point to any case which does. Accordingly, this concern fails to present a cognizable issue pursuant to Rule 10 of the Supreme Court.

CONCLUSION

Guided by the analytical framework first enunciated in *Dennard*, the Fifth Circuit properly considered whether BPAC abused its discretion in denying special retirement benefits to Aus and Pope. Aus and Pope's petition for writ of certiorari should be denied.

Respectfully submitted,

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